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10 **UNITED STATES DISTRICT COURT**

11 **FOR THE DISTRICT OF NEVADA**

12 Kush, Inc., a Nevada corporation,

13 Case No. 2:20-cv-00647-APG-NJK

14 Plaintiff,

15 v.

16 Frank Van Vranken, an individual; DOES I-
17 X, inclusive, and ROE Corporations I-X,
18 inclusive,

19 Defendants.

20 **MOTION TO DISMISS**

21 (Assigned to the Honorable
Andrew P. Gordon)

22 Oral Argument Requested – LR 78-1

23 COMES NOW Defendant Frank Van Vranken, Sr. (“Defendant”), by and through
24 undersigned counsel, and submits his Motion to Dismiss (“Motion”) this action. Dismissal
25 is warranted based on Plaintiff Kush, Inc.’s (“Kush”) failure to state a claim upon which
26 relief can be granted in accordance with Federal Rules of Civil Procedure 12(b)(6) and failure
27 to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b). This
28 Motion is supported by the following Memorandum of Points and Authorities.

1 RESPECTFULLY SUBMITTED this 13th day of April, 2020.
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4 **McKELLEB CARPENTER HAZLEWOOD**
5
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7 By: /s/ Gregory A. Stein
8

9 Michael W. McKelleb, Esq.
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14 **MEMORANDUM OF POINTS AND AUTHORITIES**
15

16 **I. INTRODUCTION**

17 Defendant is a longtime resident of the State of California. With his son and business
18 associate, Frank Van Vranken, Jr. (“Frank Jr.”), Defendant owns or controls the following
19 California business entities: (1) Van Vranken Enterprises, Inc. (“VVE”); (2) Mendocino
20 Green, LLC (“Mendocino Green”); and (3) North Cal Wood Products, Inc. (“NCWP”).
21 Mendocino Green is in the business of growing, cultivating, and selling marijuana to
22 consumers for both medicinal and recreational purposes. To this end, Mendocino Green
23 holds state and county cannabis licenses authorizing it to operate a cannabis/marijuana
24 business in the State of California and in Mendocino County, California. NCWP operates a
25 lumber mill and lumberyard and produces reclaimed wood products for sale to consumers.
26 VVE owns adjoining parcels of land in Ukiah, Mendocino County, California—located at
27 700 Kunzler Ranch Road and 860 Kunzler Ranch Road (the “Property”)—upon which
28 Mendocino Green grows and cultivates its marijuana and NCWP operates its lumber mill
and lumberyard. Mendocino Green and NCWP lease sections of the Property; VVE is their
landlord.

1 In 2017, Kush approached Defendant and the parties began discussing a possible
2 business arrangement whereby Kush would invest certain sums of money in VVE,
3 Mendocino Green, and/or NCWP in exchange for ownership interests in the entities.
4 Initially, Kush was primarily interested in NCWP and provided capital sufficient for NCWP
5 to purchase a working, Midwest lumber mill and ship it to the Property. However, Kush
6 quickly lost interest in NCWP and Defendant/NCWP were forced to spend significant sums
7 of money to later reconstruct the lumber mill on the Property after it was delivered. Kush
8 never compensated Defendant/NCWP for these expenses. After losing interest in NCWP,
9 Kush shifted its attention to Mendocino Green. As stated in its Complaint, Kush was attracted
10 to the “emerging cannabis regulations in California that the [P]roperty was ideally suited for,
11 upon which Kush secured multiple licenses that would enable projected revenue of \$1-2M
12 by the second year of operation – with long term forecasts exceeding \$10M per year.”
13 Complaint at ¶ 20.

14 In October 2018, VVE and Kush executed a Securities Purchase Agreement (the
15 “VVE Agreement”). At the same time, Mendocino Green and Kush executed a Membership
16 Purchase Agreement (the “MG Agreement”). Although separately-executed contracts, the
17 VVE Agreement and the MG Agreement were inextricably intertwined and the propriety of
18 each necessarily depended on the other. In exchange for ownership interests in VVE and
19 Mendocino Green, Kush agreed through both Agreements to: (i) forgive all of the capital
20 investments made to date; (ii) assume and pay-off mortgages currently encumbering the
21 Property; (iii) provide additional operating capital necessary to expand the Mendocino Green
22 and NCWP operations; and (iv) convey stock in Kush and its parent company’s burgeoning
23 corporate marijuana empire to Defendant and Frank Jr.

1 Unfortunately, Defendant realized in mid-to-late 2019 that Kush had no interest in
 2 assuming and paying-off the mortgages encumbering the Property (Defendant was forced to
 3 obtain expensive, hard-money loans to avoid foreclosure of the Property) or providing
 4 sufficient operating capital to expand the Mendocino Green and NCWP operations. In fact,
 5 Kush actually harmed Mendocino Green's operations by forcing it to grow, cultivate, and
 6 sell Kush's patented "Ecuadorian Sativa" strain of marijuana, which proved costly and
 7 unpopular with consumers. Defendant also learned that Kush had imposed material,
 8 extracontractual restrictions on the stock it transferred through the VVE and MG
 9 Agreements, rendering those stock shares significantly less valuable than Defendant and
 10 Frank Jr. had bargained-for. Consequently, the parties' business relationship broke down and
 11 Kush filed the present lawsuit in Nevada state court on February 27, 2020.¹

12 **II. STANDARD OF REVIEW**

13 Under Rule 12(b)(6), a claim may be dismissed if it does not state a claim upon which
 14 relief can be granted. *See N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir.
 15 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim,
 16 dismissal is appropriate when the complaint does not give the defendant fair notice of a
 17 legally-cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*,
 18 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim,
 19 the Court will accept all material allegations as true and construe them in the light most
 20 favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

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 28 ¹ Kush also filed a parallel lawsuit against Frank Jr. in Nevada state court on February 27,
 29 2020. Frank Jr. recently removed that lawsuit to this Court, where it is pending before the
 30 Honorable James C. Mahan at Case No. 2:20-cv-00649-JCM-DJA.

1 However, the Court is not required to accept as true allegations that are merely conclusory,
2 unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State*
3 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action with
4 conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation
5 is *plausible*, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

7 Additionally, a court may also dismiss a complaint for failure to comply with Rule
8 9(b). *See Miscellaneous Serv. Workers, Drivers & Helpers, Teamsters Local #427 v. Philco-*
9 *Ford Corp., WDL Div.*, 661 F.2d 776, 782 (9th Cir. 1981). To that end, Rule 9(b) requires
10 that, “[i]n alleging fraud or mistake, a party must state with particularity the circumstances
11 constituting fraud or mistake.” Fed. R. Civ. P. 9(b).

14 Finally, while materials outside of the pleadings are not ordinarily considered on a
15 motion to dismiss, the Ninth Circuit has identified two exceptions that permit courts to
16 consider materials outside of the pleadings without converting a motion to dismiss to a
17 motion for summary judgment. *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001). “First,
18 a court may consider material which is properly submitted as part of the complaint....If the
19 documents are not physically attached to the complaint, they may be considered if the
20 documents’ authenticity is not contested and the plaintiff’s complaint necessarily relies on
21 them.” *Id.* “Second, under Fed. R. Evid. 201, a court may take judicial notice of matters of
22 public record.” *Id.* at 688-89.

1 **III. LEGAL ARGUMENT**

2 **A. The underlying contracts (including the VVE Agreement) are illegal and**
 3 **unenforceable under the Controlled Substances Act.**

4 Enforcement of the VVE Agreement as demanded by Kush would result in the
 5 enforcement of an illegal contract. No additional documents or evidence need to be
 6 referenced outside of Kush's Complaint itself. Specifically, Kush's Complaint contains the
 7 following allegations demonstrating that Kush's primary purpose in entering into the VVE
 8 Agreement was to advance its presence in the marijuana industry and to invest in and partner
 9 with existing companies to grow, cultivate, and sell marijuana:

12 8. Kush² holds production and marketing rights to "Ecuadorian Sativa," the
 13 first patented cannabis strain....

14 19. [At the time the VVE Agreement was executed, Defendant] committed to
 15 working with Kush to save and expand NCWP, to get MG licensed [to grow,
 16 cultivate, and sell marijuana] and generating significant revenue....

17 20. Kush, for its part, was attracted to the improving lumber market and the
 18 emerging cannabis regulations in California that the property was ideally suited
 19 for, upon which Kush secured multiple licenses that would enable projected
revenue of \$1-2M by the second year of operation – with long term forecasts
exceeding \$10M per year.

20 24. ...Kush disbursed a sum at or near \$1.5M – including a large portion
 21 designated for the MG build out, [cannabis] licensing and operations, with Kush
 22 purchasing a majority (60/40) interest in MG.

23 32. [Defendant] has claimed to have legally grown more than of [sic] 1,000
 24 units of cannabis in 2018 and at or near 1,000 in 2019.

25 33. [Defendant] has failed to report sales since the contracts were signed.

26 35. [Defendant] has refused to pay to Kush sums received from NCWP and
 27 MG [in relation to growing, cultivating, and selling marijuana] which were

28 ² Defendant notes that Plaintiff's name itself ("Kush") is a common slang term for
 marijuana.

1 properly distributable to Kush under the lease agreements between Kush and
2 NCWP and MG.

3 (Emphasis added).

4 The foregoing allegations unmistakably demonstrate that Kush has failed to state a
5 claim under Rule 12(b)(6) because enforcing the VVE Agreement **would require this Court**
6 **to enforce a contract for the operation and expansion of a marijuana-cultivation**
7 **business, which is illegal under Federal law**, namely the Controlled Substances Act,
8 codified at 21 U.S.C. § 801 *et seq.* Furthermore, state law provides the rule of decision on
9 the merits in this case, since Kush’s theory of the purported breach of contract would require
10 this Court to find that a contract for the operation and expansion of a drug business is
11 enforceable, which it cannot do. *See Shimrak v. Garcia-Mendoza*, 912 P.2d 822, 825 (Nev.
12 1996) (Nevada recognizes the rule that “traditionally neither courts of law nor equity will
13 interpose to grant relief to parties to an illegal agreement.”); *see also Rivero v. Rivero*, 216
14 P.3d 213, 226 (Nev. 2009) (“Parties are free to contract, and the courts will enforce their
15 contracts if they are not unconscionable, illegal, or in violation of public policy.”) (emphasis
16 added); *see also Loomis v. Lange Fin. Corp.*, 865 P.2d 1161, 1165 (Nev. 1993) (“No court
17 should be required to serve as paymaster of the wages of crime.”).

18 Each of Kush’s seven claims for relief necessary depend upon the validity and
19 enforceability of the VVE Agreement. Kush’s First Claim for Relief (Breach of Contract)
20 seeks damages based on Defendant’s purported breach of the VVE Agreement; the Second
21 Claim for Relief (Specific Performance) requests an order from this Court requiring
22 Defendant to specifically perform certain aspects of the VVE Agreement; the Third Claim
23 for Relief (Injunction) requests injunctive relief based on Kush’s assertion that Defendant
24

1 failed to take action required under the VVE Agreement; the Fourth Claim for Relief
2 (Declaratory Relief) seeks “[a] determination of the parties’ rights and obligations under the
3 VVE Agreement”; the Fifth Claim for Relief (Breach of the Covenant of Good Faith and
4 Fair Dealing) alleges that Defendant acted “knowingly and intentionally...to deny Kush its
5 reasonable and justified expectations under the VVE Agreement”; the Sixth Claim for Relief
6 (Deceptive Trade Practices) contains Kush’s assertion that Defendant made false
7 representations in relation to and as part of the VVE Agreement; and the Seventh Claim for
8 Relief (Interference with Prospective Economic Advantage) alleges that Defendant acted
9 intentionally and in derogation of his obligations under the VVE Agreement to prevent Kush
10 from enjoying the benefit of certain prospective contractual relationships. Because the VVE
11 Agreement is illegal and unenforceable and each of Kush’s claims for relief necessarily
12 depend upon the validity and enforceability of the VVE Agreement, the Court must dismiss
13 Kush’s entire Complaint.

14 As set forth above, the Ninth Circuit has identified two exceptions that permit courts
15 to consider materials outside of the pleadings without converting a motion to dismiss to a
16 motion for summary judgment—(a) documents either physically attached or central to the
17 allegations of a complaint; and (b) matters of public record. *Lee*, 250 F.3d at 688-89. The
18 second exception is directly applicable here. On February 14, 2019, Kush filed its Form S-1
19 Registration Statement with the United States Securities and Exchange Commission
20 (“SEC”). *See* Form S-1 attached hereto as **Exhibit “A.”** Kush’s Form S-1 is a matter of
21 “public record” and is easily accessible using the SEC’s online “EDGAR” database through
22 the following website link: <https://www.sec.gov/Archives/edgar/data/1695829/>

1 <000093979819000007/kushsone.htm>. As part of its Form S-1, Kush described its general
 2 business operations as follows:

3
 4 Kush is a business acquisition and development company that focuses on using
 5 leading edge technology and proprietary intellectual property to build brand names
 6 in the cannabis and holistic health and wellness markets. We develop and integrate
 7 science based education and wellness systems, perform medical clinical research
 8 and product R&D under University Independent Review Boards (IRBs), and
 9 secure strategic marketing, branding, and acquisition opportunities in legal
 10 cannabis and holistic health related industries. At Kush, we believe that good
 11 health is a core essential in achieving happiness and personal well-being.

12
 13 Kush licenses intellectual property including our processes, and then contracts with
 14 independent and licensed cannabis cultivators and processors who grow and
 15 handle the plant material, perform manufacturing processes, and work through
 16 distribution in order to service both medical marijuana patients and recreational
 17 cannabis consumers, all according to appropriate state cannabis laws.

18
 19 *Id.* at 6 (emphasis added).

20 Moreover, Kush's Form S-1 carefully details the inherent risks of its business
 21 practices:

22
 23 ***Cannabis continues to be a Controlled Substance under the United States***
 24 ***Federal Controlled Substances Act and our business may result in federal civil***
 25 ***or criminal prosecution.***

26
 27 We are directly engaged in the medical and adult-use cannabis industry in the
 28 U.S. where local state law permits such activities however all such activities
 remain illegal under federal law in the U.S. Investors are cautioned that in the
 U.S., cannabis is highly regulated at the state level. To our knowledge, there are
 to date a total of 33 states, and the District of Columbia, Puerto Rico and Guam
 that have legalized medical cannabis in some form, including California,
 although not all states have fully implemented their legalization programs. Ten
 states and the District of Columbia have legalized cannabis for adult use. Fifteen
 additional states have legalized high-cannabidiol ("CBD"), low Delta-9-
 tetrahydrocannabinol ("THC") oils for a limited class of patients.
 Notwithstanding the permissive regulatory environment of cannabis at the state
 level, cannabis continues to be categorized as a Schedule I controlled substance
 under the U.S. Controlled Substance Act of 1970 (codified in 21 U.S.C.A.
 Section 812) (the "Controlled Substances Act"). Under United States federal
 law, a Schedule I drug is considered to have a high potential for abuse, no
 accepted medical use in the United States, and a lack of accepted safety for the

1 use of the substance under medical supervision. Federal law prohibits
 2 commercial production and sale of all Schedule I controlled substances, and as
 3 such, cannabis-related activities, including without limitation, the importation,
 4 cultivation, manufacture, distribution, sale and possession of cannabis remain
 5 illegal under U.S. federal law. It is also illegal to aid or abet such activities or to
 6 conspire or attempt to engage in such activities. Strict compliance with state and
 7 local laws with respect to cannabis may neither absolve us of liability under U.S.
 8 federal law, nor provide a defense to any federal proceeding brought against us.
 An investor's contribution to and involvement in such activities may result in
 9 federal civil and/or criminal prosecution, including, but not limited to, forfeiture
 10 of his, her or its entire investment, fines and/or imprisonment.
 11 ...
 12

13 ***We could experience difficulty enforcing our contracts.***

14 Due to the nature of our business and the fact that our contracts involve cannabis
 15 and other activities that are not legal under U.S. federal law and in some
 16 jurisdictions, we may face difficulties in enforcing our contracts in federal and
 17 certain state courts. The inability to enforce any of our contracts could have a
 18 material adverse effect on our business, operating results, financial condition or
 19 prospects.

20 *Id.* at 8 and 14 (underlined text added; bold and italicized text in original).

21 Based on the detailed statements set forth above, Kush has admitted that the
 22 underlying contract it seeks to enforce is illegal under federal law and unenforceable in
 23 federal court. Consequently, Defendant respectfully requests that the Court dismiss Kush's
 24 entire Complaint—a result Kush clearly understood to be a likely result if it sought to enforce
 25 the terms of one of its contracts in federal court.

26 **B. VVE has owned both parcels that comprise the Property since 2003 and**
 27 **2011, respectively.**

28 If the Court declines to dismiss Kush's Complaint in its entirety, the Court should
 29 alternatively dismiss Kush's Third (Injunction), Sixth (Deceptive Trade Practices), and
 30 Seventh Claims for Relief (Interference with Prospective Economic Advantage). As set forth
 31 throughout its Complaint, Kush contends that Defendant acted wrongfully by failing to

1 transfer the subject parcels that comprise the Property and were allegedly titled in
 2 Defendant's name into VVE's name. However, despite Kush's assertions to the contrary,
 3 VVE has owned both of the subject parcels since 2003 and 2011, respectively. *See* Grant
 4 Deed³ and Quit-Claim Deed⁴ attached hereto as **Exhibits "B"** and **"C,"** respectively.
 5 Accordingly, there is no legitimate dispute that the Property has not been titled in
 6 Defendant's name during any time period applicable to Kush's Complaint.
 7

8 With respect to a court's consideration of materials outside of the pleadings, both
 9 exceptions approved by the Ninth Circuit are applicable here. As stated above, an
 10 overarching theme of Kush's Complaint is its contention that Defendant acted wrongfully
 11 by failing to transfer the Property that was allegedly titled in Defendant's name into VVE's
 12 name. Kush repeats some variation of this claim in at least 21 separate paragraphs of its
 13 Complaint. *See* Complaint at ¶¶ 38-41, 57, 71-72, 81-84, 87-88, 95, 97, 101-102, 104, 106,
 14 and 111-112. Based upon even a cursory review of Kush's Complaint, it is clear that title to
 15 the Property and the expected profits to be derived from growing marijuana plants thereon
 16 were the most important or "central" factors to Kush in executing the VVE Agreement.
 17 Furthermore, the vesting deeds attached hereto as **Exhibits "B"** and **"C,"** constitute
 18 official/public records of Mendocino County, California for which there is no legitimate
 19 dispute as to authenticity.
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 28 ³ Recorded on August 18, 2003 in the Office of the Mendocino County (California)
 Recorder at Document No. 2003-21488.

⁴ Recorded on November 2, 2011 in the Office of the Mendocino County (California)
 Recorder at Document No. 2011-15403.

1 Upon review of the vesting deeds, the Court must dismiss Kush’s Third, Sixth, and
2 Seventh Claims for Relief. In its Third Claim for Relief (Injunction), Kush requests an order
3 from this Court “enjoin[ing] [Defendant] from any transfer, encumbrance, and otherwise as
4 necessary to maintain the Property free and clear of all liens, charges, encumbrances, debts,
5 obligations and liabilities whatsoever.” *Id.* at ¶ 84. Because he does not own the Property,
6 however, Kush’s Third Claim for Relief requesting an injunction prohibiting Defendant from
7 transferring or encumbering the Property fails to state a claim for relief and must be
8 dismissed. Moreover, the entirety of Kush’s Sixth (Deceptive Trade Practices) and Seventh
9 Claims for Relief (Interference with Prospective Economic Advantage) involves its assertion
10 that Defendant acted wrongfully by failing to transfer the Property that was allegedly titled
11 in Defendant’s name into VVE’s name. Nevertheless, as repeatedly stated herein, the
12 Property is and has always been titled in VVE’s name. Consequently, Kush’s Sixth and
13 Seventh Claims for Relief seeking monetary damages also fail to state claims for relief and
14 must be dismissed.

19 **C. Kush failed to plead fraud with particularity as required by Rule 9(b).**

20 As a further alternative argument—and to the extent the Court views Kush’s Sixth
21 Claim for Relief as asserting false representations apart from ownership of the Property—the
22 Court must dismiss Kush’s Sixth Claim for Relief based on its failure to plead fraud with
23 particularity as required by Rule 9(b). Upon review, the only allegations contained in Kush’s
24 Sixth Claim for Relief that are even arguably pled with particularity again relate to the
25 ownership of the Property. *See id.* at ¶¶ 101-102. For the reasons set forth above, the Property
26 is and has always been titled in VVE’s name.

1 Finally, Paragraph 103 of Kush's Complaint, which states that "Defendants
2 knowingly made other false representations in the VVE Agreement for pecuniary gain, to be
3 proven at time of trial," does not satisfy the heightened pleading standard required by Rule
4 9(b). *See Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989) ("A
5 pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so
6 that a defendant can prepare an adequate answer from the allegations. While statements of
7 the time, place and nature of the alleged fraudulent activities are sufficient, mere conclusory
8 allegations of fraud are insufficient."). As evident, Paragraph 103 represents Kush's mere
9 conclusory allegation that Defendant engaged in fraudulent activity, without identifying the
10 circumstances or providing any context so that Defendant can prepare a responsive pleading.
11
12

13 **IV. CONCLUSION**

14 For the reasons detailed herein, Defendant respectfully requests that the Court dismiss
15
16 Kush's Complaint.
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18 RESPECTFULLY SUBMITTED this 13th day of April, 2020.
19

20 **McKELLEB CARPENTER HAZLEWOOD**

21
22 By: /s/ Gregory A. Stein
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28

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2020, I electronically transmitted the foregoing Motion to Dismiss using the CM/ECF System for filing, and that I transmitted a Notice of Electronic Filing to the following CM/ECF registrants:

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